

**STATE OF MICHIGAN
IN THE SUPREME COURT**

JULIE A. PUCCI,

Plaintiff-Appellant,

vs.

CHIEF JUDGE MARK W. SOMERS,
in his individual capacity,

Defendant,

and

19TH JUDICIAL DISTRICT COURT,

Garnishee Defendant-Appellee

Supreme Court No. 153893

Court of Appeals No. 325052

Wayne County Circuit Court
Case No. 13-014644-CZ

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**GARNISHEE DEFENDANT-APPELLEE
NINETEENTH DISTRICT COURT'S
BRIEF ON APPEAL**

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does the chief judge of a district court possess the authority to adopt an employee indemnification policy on behalf of the district court under MCL 691.1408(1) and/or MCR 8.110(C)?

Appellant answers: Yes.

Appellee answers: No.

2. If a chief judge possesses such authority, may the judge adopt a policy that indemnifies employees for liability incurred in their personal capacities?

Appellant answers: Yes.

Appellee answers: No.

3. Did the conduct of Judge Somers that gave rise to the judgment against him in the federal district court occur “while in the course of his employment and while acting within the scope of his . . . authority” under MCL 691.1408(1)?

Appellant answers: Yes.

Appellee answers: No.

INTRODUCTION

Appellant Julie Pucci is asking this Court to take an action that is entirely without legal precedent. She seeks to hold Appellee Nineteenth District Court (the “Court”) financially responsible for a \$1.1 million judgment entered against its former chief judge, Mark Somers, in December, 2011 after a federal jury found, at her own urging, that he violated her constitutional rights because he had a personal vendetta against her having nothing to do with the business of the Court. It is undisputed that the Court has no direct liability on the judgment that Ms. Pucci seeks to collect from it. Not only did the Sixth Circuit Court of Appeals dismiss the Court from the underlying case nearly seven years ago, finding that it was immune from her claims, but the resulting judgment was entered against Judge Somers in his individual capacity only. Accordingly, under decades of United States Supreme Court jurisprudence, it can be collected only from his own personal assets, and not the official coffers of the court on which he sat.

Ms. Pucci offers just a single reason why she should be permitted to garnish the Court to collect on a private financial obligation flowing from the personal misconduct of a judge based on claims from which the Court was immune. Nine days before the case against Judge Somers went to trial, he attempted to absolve himself of any liability for his actions by unilaterally adopting a self-serving “indemnification policy” that purportedly required the Court to pay any judgment that was entered against him. Ms. Pucci seeks to enforce that policy here by garnishing from the Court the monies that are supposedly owed to Judge Somers under it.

Ms. Pucci’s writ of garnishment fails because the indemnification policy on which it is based is unenforceable. No other chief judge in the State of Michigan has ever adopted a policy purporting to indemnify himself or herself for an otherwise personal liability. Nor has any court in this state ever held that any judge has the power to do so. In fact, this Court has held just the

opposite. Judges may not autonomously create or compel appropriations for new liabilities without either obtaining approval of the funding units of the courts that they serve, or instituting a lawsuit against their funding unit at which they bear the burden of proof – by clear and convincing evidence – that the requested funding is required to satisfy a critical judicial need and essential to the operation of the court. The purpose of that rule is to ensure that there is an appropriate system of checks and balances in place to prevent exactly what occurred here: an unbridled mandate by a self-interested judge requiring taxpayers to fund a personal expense that should not otherwise be borne by the public.

No Michigan statute or court rule allows Judge Somers to override the constitutional separation of powers between the legislative and judicial branches. He lacked the authority to adopt the indemnification policy on which Ms. Pucci's garnishment claim is based, and thus she lacks the ability to collect the personal capacity judgment entered against him from the assets of the Court. The ruling of the Court of Appeals dismissing her writ of garnishment should be affirmed.

COUNTER-STATEMENT OF FACTS

A. The Underlying Federal Lawsuit Against Judge Somers

On February 12, 2007, Ms. Pucci filed a Complaint in the United States District Court for the Eastern District of Michigan against Defendants Mark W. Somers, the City of Dearborn, and the Nineteenth District Court. Ms. Pucci sued Judge Somers, who was then the chief judge for the Court, in both his official and individual capacities. The case was assigned to the Honorable David Lawson. Ms. Pucci alleged in her lawsuit that Judge Somers wrongfully terminated her from her position as deputy court administrator for the Court because he disapproved, for religious reasons, of the fact that she was living with one of the other judges on the Court

without being married to him. *See Pucci v. Nineteenth District Court*, 565 F. Supp. 2d 792, 796 (E.D. Mich. 2008). She also alleged that Judge Somers terminated her because she complained of his practice of interjecting his personal religious beliefs in judicial proceedings. *See id.* at 797. Ms. Pucci contended that her termination had nothing to do with the business of the Court, and that Judge Somers fired her out of “animus” and in pursuit of his own “personal interests.” Third Amended Compl., at ¶¶ 45, 51, 79 (attached as Exhibit N to Appellant’s Appx., at pp. 123a-124a, 130a-131a).

On June 14, 2007, the City of Dearborn was voluntarily dismissed from the case as it played no role in the termination decision. On December 16, 2010, after an appeal to the U.S. Court of Appeals for the Sixth Circuit, all of Ms. Pucci’s claims against the Nineteenth District Court were dismissed on sovereign immunity grounds. The damage claims asserted against Judge Somers in his official capacity were dismissed for the same reason. *See Pucci v. Nineteenth District Court*, 628 F.3d 752, 769 (6th Cir. 2010). That ruling left Judge Somers – in his individual capacity only – as the sole defendant against Ms. Pucci’s damage claims.¹ Trial of those individual capacity damages claims began on June 22, 2011. *See* Opinion and Order Granting Motion to Quash Writs of Garnishment, at p. 3 (attached as Exhibit A to Appellee’s Appx., at p. 4b).

On June 13, 2011, just nine days before the start of trial, Judge Somers created a so-called “Civil Liability Indemnification Policy Regarding Administrative Functions” for the Court. That policy stated as follows:

¹ The Sixth Circuit did allow Ms. Pucci to proceed against Judge Somers in his official capacity for the limited purposes of adjudicating her claim for prospective injunctive relief. However, that claim is not at issue in this appeal which deals exclusively with the monetary judgment that Ms. Pucci obtained against Judge Somers in his individual capacity.

[I]t is the official policy of the 19th District Court that the supervisory personnel identified herein [later defined to include all judges of the Court] shall be indemnified and held harmless for the costs of defending and for any judgment entered against them resulting from any civil action for discretionary administrative decisions made within the scope of his or her authority including decisions regarding the hiring, firing and/or discipline of its employees.

Indemnification Policy, at p. 1 (attached as Exhibit D to Appellant's Appx., at p. 26a). Judge Somers adopted the policy unilaterally, without the approval of either the City of Dearborn, which serves as the Court's funding unit, or any higher court.

Trial of the case against Judge Somers lasted approximately one week. Judge Somers attempted to defend the individual capacity claims against him by suggesting that he terminated Plaintiff pursuant to a broader reorganization of the Court. *See Pucci v. Nineteenth District Court*, 596 Fed. Appx. 460, 475 (6th Cir. 2015). Ms. Pucci repeatedly challenged that assertion, maintaining that the "reorganization [was] a fabrication," that any notion that Judge Somers was making a "business decision" was a "sham," and that he terminated her out of "malevolence" because he had a "vendetta" against her. Transcript of Pucci/Somers Trial, June 30, 2011, at pp. 960, 971, 981, 1031, 1037 (attached as Exhibit B to Appellee's Appx., at pp. 22b, 33b, 43b, 93b, 99b). She told the jury at closing argument: "Everything here is personal." *Id.* at 960 (Appellee's Exh. B, at p. 22b).

The jury agreed with Ms. Pucci and "rejected" the reorganization defense advanced by Judge Somers. *Pucci*, 596 Fed. Appx. at 475. On June 30, 2011, it returned a verdict against him in his individual capacity only. Specifically, it found that Judge Somers had violated Ms. Pucci's right to procedural due process and retaliated against her for the exercise of her First Amendment Rights by terminating her. *See Order Quashing Garnishment*, at p. 3 (Appellee's Exh. A, at p. 4b). On December 16, 2011, Judge Lawson entered a judgment in the amount of \$1,173,125.30 against Judge Somers, in his individual capacity only, based on the jury's verdict.

See id. That judgment included \$200,000 in punitive damages that the jury had awarded against him. *See Pucci*, 596 Fed. Appx. at 466.

B. Plaintiff's Effort to Garnish the City of Dearborn in Federal Court

Following entry of the judgment, Ms. Pucci appropriately took action to collect the money owed her from Judge Somers' personal assets, and she is currently garnishing his salary on a periodic basis. On May 15, 2012, however, Ms. Pucci also attempted to collect from the City of Dearborn by filing a non-periodic writ of garnishment against it in federal court seeking full payment of the judgment.² Judge Lawson ultimately quashed that writ, finding that he lacked jurisdiction to entertain it. In his opinion dismissing the matter, however, Judge Lawson found that there was an "important" distinction between individual and official capacity judgments which Ms. Pucci, by serving a writ of garnishment on the City, had attempted to "elide." Order Quashing Garnishment, at p. 11 (Appellee's Exh. A, at p. 12b). Specifically, he noted that "an award of damages against an official in his personal capacity can be executed only against the official's personal assets." *Id.*, at p. 12 (Appellee's Exh. A, at p. 13b). Judge Lawson also stated that Judge Somers' effort to transfer this personal liability to the Court by adopting a policy indemnifying himself for his own misconduct "ought to raise eyebrows." *Id.*, at p. 4 (Appellee's Exh. A, at p. 5b).

² Ms. Pucci tries to make much of the fact that the Court, under the then-leadership of Chief Judge Wygonik, filed an amicus brief supporting her attempted garnishment of the City in federal court. The reason for that filing is simple – Judge Wygonik was a friend of Judge Somers due in large part to the fact that Judge Somers supported his election campaign. However, Judge Wygonik no longer sits on the Court. The distinction of Chief Judge belongs to Judge Salamey, who does not believe the taxpayers should be forced to pay for the personal financial obligations of Judge Somers. He testified quite clearly: "I don't believe that the court is obligated to indemnify or pay judgments or enter into settlements on behalf of employees or the judges for that matter if they are acting in their own individual capacity or if a judgment is rendered against a judge in his own individual capacity." Transcript of Deposition of Judge Salamey, at pp. 24-25 (attached as Exhibit C to Appellee's Appx., at pp. 145b-146b).

C. Plaintiff's Effort to Garnish the Nineteenth District Court

Ms. Pucci did not accept Judge Lawson's ruling. Instead, immediately following his decision, she proceeded to domesticate the individual capacity judgment against Judge Somers in Wayne County Circuit Court. *See* Affidavit and Notice of Entry of Foreign Judgment, at p. 1 (attached as Exhibit F to Appellant's Appx., at p. 32a). Then, on December 4, 2013, she filed another non-periodic writ of garnishment, this time seeking to collect from the Court, rather than the City, the entire amount of the individual capacity judgment entered against Judge Somers. *See* Request and Writ for Garnishment, at p. 1 (attached as Exhibit G to Appellant's Appx., at p. 36a). The Court objected to the writ on the ground that it could not be held responsible for an individual capacity judgment, and that Judge Somers lacked the unilateral power to adopt an indemnification policy purporting to transfer his personal liability to the Court.

D. The Decision of the Trial Court

On December 4, 2014, Ms. Pucci and the Court filed cross motions for summary disposition under MCR 2.116(C)(10) seeking a ruling on the issue of the Court's liability as a garnishee defendant. Those motions were heard by the Honorable Robert L. Ziolkowski on November 14, 2014, less than two months before his retirement. Judge Ziolkowski took the motions under advisement and delivered his decision from the bench on November 26, 2014.

Judge Ziolkowski found that the Court was responsible for the entire amount of the unpaid judgment under the indemnification policy adopted by Judge Somers. In so doing, he acknowledged that Judge Somers was "motivated by his own personal bias and prejudice" when he terminated Ms. Pucci, and that "[i]t might not be the nicest thing to do, to dump your responsibilities and liability onto a funding unit." Transcript of Summary Disposition Hearing, at pp. 7, 11 (attached as Exhibit H to Appellant's Appx., at pp. 45a, 49a). However, Judge

Ziolkowski determined that Judge Somers had the ability to unilaterally indemnify himself for his own misconduct because he had the power as chief judge to supervise the performance of all court personnel, and thus he was “exercising the authority that was vested in him . . . when he discharged the plaintiff.” *Id.* at pp. 10-11 (Appellant’s Exh. H, at pp. 48a-49a).

Judge Ziolkowski granted Plaintiff’s summary disposition motion, denied the Court’s summary disposition motion, and entered judgment against the Court in the amount of \$1,183,330.96. *See* Order Granting Plaintiff’s Motion for Summary Disposition and Denying Garnishee-Defendant’s Motion for Summary Disposition, at p. 2 (attached as Exhibit I to Appellant’s Appx., at p. 58a). However, he expressed uncertainty as to whether he had reached the right result. Immediately after he announced his decision, Judge Ziolkowski stated: “I’ll be the first one to admit, I may be wrong,” and he went on to explain that the parties would have to “get some ultimate resolution” from a higher court. Transcript, at pp. 15-16 (Appellant’s Exh. H, at pp. 53a-54a).

E. The Decision of the Court of Appeals

The Court timely appealed Judge Ziolkowski’s decision to the Court of Appeals, which held oral argument on the matter. On March 17, 2016, the Court of Appeals issued an opinion and order reversing his ruling and remanding the case with instruction to enter summary disposition in favor of the Court. Court of Appeals Decision, at p. 8 (attached as Exhibit A to Appellant’s Appx., at p. 9a). The Court of Appeals recognized in its opinion that judges have the power to hire and fire court employees. However, it went on to explain that judges do not have the unilateral ability to compel whatever appropriations they want for any issue that touches upon a personnel decision. The Court of Appeals noted that, under basic separation of powers principles, judges must exercise their employment authority within “the limited dollars

appropriated to [them] by the legislative branch,” and they lack the independent ability to procure monies for expenditures that have not been approved by the funding units of the courts they serve. *Id.* at pp. 6-7 (Appellant’s Exh. A, at pp. 7a-8a).

The Court of Appeals found that Judge Somers’ indemnification policy violated these basic rules as he sought to compel Court funding of an individual capacity judgment that the Court had no obligation to pay and which the funding unit had never approved. It held: “While we agree that a Chief Judge can adopt an indemnification policy that covers the court’s court employees and judges while acting in their official capacity [i.e. claims which operate against the Court and impose organizational liability], we do not believe that this power extends to indemnifying judges for liability incurred in their personal capacity [i.e. claims which operate against the individual and are collectable only from personal assets].” *Id.* at p. 8 (Appellant’s Exh. A, at p. 9a). Accordingly, the Court of Appeals concluded that the Court was “not liable” for the judgment and could not be garnished. *Id.*

Consistent with the decision of the Court of Appeals, no other chief judge in the entire State of Michigan has adopted a similar policy, despite Ms. Pucci’s best efforts to unearth one. She subpoenaed the State Court Administrator’s Office (“SCAO”) in this action for copies of “any and all indemnification policies adopted by and of the judges of Circuit Courts, District Courts (other than the 19th District Court), Probate Courts and Municipal Courts in the State of Michigan.” SCAO’s Response to Plaintiff Pucci’s Subpoena for Documents, at p. 3 (attached as Exhibit D to Appellee’s Appx., at p. 187b). SCAO responded: “None have been identified.” *Id.* The official representative of SCAO later testified at her deposition that no one in her office had ever seen “anything like [Judge Somers’ indemnification policy] before,” and she explicitly told

Judge Somers that she had no ability to authorize it. Transcript of Deposition of Deborah Green, at pp. 15, 23-24 (attached as Exhibit E to Appellee's Appx., at pp. 195b, 197b).

It is that unprecedented and unauthorized indemnification policy that serves as the centerpiece of Ms. Pucci's garnishment claim on appeal to this Court.

STANDARD OF REVIEW

The Court agrees with Ms. Pucci that the issues raised in this appeal present questions of law that are subject to a *de novo* standard of review.

ARGUMENT

A. A Chief Judge Lacks the Authority to Adopt an Employee Indemnification Policy on Behalf of a District Court under MCL 691.1408 and MCR 8.110.

The indemnification of government employees is governed by the Governmental Tort Liability Act ("GTLA"). It provides, in relevant part:

Whenever a judgment for damages is awarded against an officer, employee, or volunteer of a governmental agency as a result of a civil action for personal injuries or property damage caused by the officer, employer of volunteer while in the course of employment and while acting within the scope of his or her authority, the governmental agency may indemnify the officer, employee, or volunteer to pay, settle, or compromise the judgment.

MCL 691.1408(1) (emphasis added). The plain language of the statute reveals two important points. First, the decision to indemnify is a "discretionary" one as signified by the statute's use of the permissive word "may." *Warda v. City Council*, 472 Mich. 326, 332 (2005). Under the GTLA, indemnification is not an absolute right bestowed upon government employees as a consequence of their employment. It is an option that may be exercised on a discretionary basis when a judgment for damages is entered.

Second, not just anyone can exercise the discretionary power to indemnify a government employee. An indemnification decision may only be made by a "governmental agency." MCL

691.1408(1). There is no dispute that the district courts in this state are governmental agencies within the meaning of the indemnification statute. *See* MCL 691.1401(a)&(e) (defining “governmental agency” to include a state, county, and municipality and any “agency, department, court, board, or council” of these branches of government). The key question, however, is who has the authority to act on behalf of a district court in exercising the statutory power to indemnify and, more specifically, whether a chief judge has the unilateral ability to force a district court’s funding unit, through the adoption of an indemnification policy, to pay for a liability which it otherwise does not bear. The GTLA does not answer those important questions. They are governed instead by the application of MCR 8.110, which is commonly referred to as the “Chief Judge Rule” because it delineates the precise scope of a chief judge’s administrative and judicial powers with respect to the operation of a district court.

Notably, there is no provision in the Chief Judge Rule which explicitly references indemnification. There is also no case, published or unpublished, anywhere in the State of Michigan which holds that a chief judge has the power to make a unilateral decision to indemnify. Nor is there any district court judge, other than Judge Somers, who has ever taken it upon himself or herself to adopt an indemnification policy. Ms. Pucci does not and cannot dispute any of these fundamental points. She contends instead that a chief judge has the implicit authority to make indemnification decisions on behalf of a district court because MCR 8.110(C)(2)(c) gives a chief judge the power to “initiate policies concerning the court’s internal operations and its position on external matters facing the court.” Appellant’s Br., at 8. Ms. Pucci contends that the power to compel a court’s funding unit to pay a liability belonging to someone else is the expression of this policy-making authority.

Ms. Pucci is mistaken. Although a chief judge has broad authority to set policy regarding the operations of a district court, the scope of that authority is subject to important limits. Specifically, the Chief Judge Rule expressly requires chief judges to “effect compliance by the court with all applicable rules and provisions of law.” MCR 8.110(C)(3)(h). That limitation makes perfect sense. For example, a chief judge could not adopt a hiring policy requiring a district court to employ individuals only of a particular race or gender because that would plainly violate state and federal prohibitions against discrimination. Therefore, a chief judge’s policy-making authority under MCR 8.110 is necessarily circumscribed by his or her duty to otherwise abide by and enforce the law.

The Michigan Constitution is the supreme law of the land in this state. All judges swear an oath to uphold it when they take office. *See* Const. 1963, art. 11, § 1. The Michigan Constitution lays out a clear division of powers between the executive, legislative, and judicial branches, and this Court has repeatedly recognized that it is the legislature – not the judiciary – who wields the constitutional power to procure court funding. *See, e.g., 46th Circuit Trial Court v. Crawford County*, 476 Mich. 131, 141 (2006) (holding that the “most fundamental aspect of the legislative power . . . is the power to tax and to appropriate for specified purposes.”). Indeed, this Court has recognized that the judiciary is “the branch of government least suited to make policy-driven appropriations.” *Id.* at 155. The judiciary may compel appropriations for obligations that have not been legislatively approved only in those “rare instances” where there is a “critical judicial need” and “the overall operation of the court . . . is in jeopardy.” *Id.* at 142, 147-148. Even then, the power cannot be wielded unilaterally. Rather, a judge must institute litigation against the funding unit of the court on which he or she sits, at which the court bears the burden of proof by “clear and convincing evidence” that the funding it seeks is “both

reasonable and necessary to allow [it] to function serviceably in carrying out its constitutional responsibilities.” *Id.* at 149.

The standard for a judge to override the legislative power to appropriate is a high one. This Court has made clear that a court functions serviceably if its responsibilities can be “carried out in a barely adequate manner.” *Id.* at 150. In the *Crawford County* case, for example, the Chief Judge of the 46th Circuit Court brought a lawsuit against the court’s funding unit in an effort to obtain funding for an enhanced pension package that he wanted to adopt for court employees in an effort to boost morale and increase retention. This Court refused to approve the funding, holding that it was not necessary for the court to “function serviceably.” *Id.* at 155.

The unilateral adoption of an indemnification policy by a chief judge for a district court runs afoul of this basic constitutional principle. By definition, when one party agrees to indemnify another, the indemnifying party is committing to “make reimbursement” to the indemnified party of a loss that the indemnifying party otherwise would not be required to bear. *DaimlerChrysler Corp. v. Professional Corporate Intelligence, Inc.*, 2005 WL 3500810, at *5 (Mich. Ct. App. Dec. 22, 2005). The entire point of an indemnification policy is to take a personal liability belonging to one individual (in this case, a court employee), and transfer that liability to another (in this case, the court that the employee is supposed to serve). Ms. Pucci concedes this point, acknowledging that the indemnification of a court employee is “superfluous, hollow and meaningless in the absence of personal liability.” Appellant’s Br., at 14.

By its very nature, therefore, an indemnification policy is a decision to appropriate funds: it requires a court to pay the financial obligation of another party for which it otherwise bears no legal responsibility. Yet under basic separation of powers principles, the judiciary does not have the authority to procure funding. That is the job of the legislature. A chief judge cannot override

that constitutional directive under the auspices of the Chief Judge Rule. Either the funding unit must approve the indemnification policy, or the chief judge must file a lawsuit demonstrating that the district court cannot function without it.

Notably, there is not a single case in the State of Michigan that holds otherwise. This proposition is underscored by *Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1985), the primary case cited by Plaintiff in support of the position she advances under the GTLA. In *Beebe*, the State of Michigan decided to indemnify an officer of the Michigan State Police for a judgment entered against him in his individual capacity. Critically, however, the State of Michigan is the funding unit for the Michigan State Police. There is a big difference between an indemnification policy adopted by the funding unit of the governmental agency to which it applies, as in the *Beebe* decision, and the “self-indemnification policy” which Judge Somers drafted here on the eve of trial entirely on his own and without the approval of the Court’s funding unit. Ms. Pucci’s reliance on *Beebe* only highlights why her position in this case is unsupportable.

Ms. Pucci fairs no better with her citation to *Judicial Attorneys Association v. State of Michigan*, 459 Mich. 291 (1998). Once again, that decision underscores the Court’s position that Judge Somers lacked the unilateral power to compel funding of the individual capacity judgment entered against him. The *Judicial Attorneys* case held that while a judge has the power to make employment decisions, it is “well established both as a practical and a constitutional matter, that in the exercise of its employment responsibilities the judiciary must take into account the limited dollars appropriated to it by the legislative branch in the exercise of the Legislature’s own constitutional responsibility.” *Judicial Attorneys*, 459 Mich. at 302 (emphasis added). Judge Somers’ indemnification policy does not take into account legislative funding decisions. Just the opposite, it seeks to force the Court to assume an obligation which it otherwise would not be

required to bear and for which monies have never been appropriated. In so doing, it infringes upon the constitutionally-allocated responsibilities of the Court's funding unit. Judge Somers lacked the power to require the Court to fund a personal liability, and the policy by which he attempted to do so may not be used by Ms. Pucci to pursue a garnishment claim

In an effort to find legal purchase for her position, Ms. Pucci points to other provisions of the Chief Judge Rule that supposedly gave Judge Somers the power to indemnify. She claims, for example, that this power flowed from his duty to "supervise the performance of all court personnel." MCR 8.110(C)(3)(d). The Court does not dispute that Judge Somers bore such supervisory responsibilities, including over Ms. Pucci. As the *Judicial Attorneys* case makes clear, however, there is a plain difference between a judge's power to oversee court employees and the ability to compel whatever appropriations he or she may desire for any issue that touches upon a personnel decision. *Judicial Attorneys*, 459 Mich. at 302. This Court has explicitly held that judges lack the latter power. *See id.*

Plaintiff also cites MCR 8.110(C)(3)(f), which gives the chief judge power "to supervise court finances, including financial planning, the preparation and presentation of budgets, and financial reporting." The very language of the rule proves its limitation here. The fact that a chief judge must "prepare" and "present" a budget demonstrates that there is someone else for whom he or she is doing the preparing and presenting in order to obtain approval of the proposed expenses. By statute, that is the funding unit that appropriates the money for the court to operate. *See MCL 600.8271(1)*. ("[T]he chief judge of the judicial district shall submit to the governing body of the district funding unit a budget request in line-item form with appropriate detail."). A chief judge lacks the ability, under the guise of judicial policy-making, to bypass this process and appropriate and approve funds on his or her own.

Again, that point is demonstrated by Plaintiff's own case authorities. In *O'Neill v. Nineteenth District Court Judge William C. Hultgren*, for example, the court ruled that the Chief Judge of the Nineteenth District Court "only" had the power to "administer his budget" by "allocat[ing]" monies that the funding unit had already approved and provided.³ *O'Neill*, at p. 2 n. 2 (attached as Exhibit M to Appellant's Appx., at p. 110a). Judicial spending of monies that have been legislatively procured is hardly controversial. However, allowing a chief judge to unilaterally appropriate taxpayer funding for new obligations that he seeks to create on his own in order to indemnify himself for personal liabilities is without legal precedent.

Plaintiff also points to MCR 8.110(C)(3)(i) which authorizes a chief judge to "perform any act or duty or enter any order necessarily incidental to carrying out the purposes of this rule." That is not a license, however, to override constitutional separation of powers doctrine. Nor did this Court interpret the rule in that manner in *Schell v. Baker Furniture Co.*, 461 Mich. 502, 513 (2000). The *Schell* decision simply held that the Chief Judge of the Kent County Circuit Court had the power to "employ creative and energetic means to improve the delivery of justice" by scheduling a week of settlement conferences for the cases on the court's docket, resulting in a 55% resolution rate that saved months of trial time and taxpayer expense. That case thus involved the exact opposite fact pattern at issue here. Far from purporting to require the court to pay for an expense for which it was not otherwise liable and which had not been legislatively approved, the Chief Judge in *Schell* found a way to preserve funding that had been allocated to

³ In *O'Neill*, the Nineteenth District Court's funding unit had expressly authorized payment of one-third of the attorney fees that Judge Runco incurred in defending a claim of misconduct arising from his legal practice prior to taking the bench. Thus, in stark contrast to the facts of this case, the branch of government properly tasked with appropriating funds approved the expense and procured the money to fund it. And ironically, when Judge Somers unseated Judge Runco in 2002, he spent much of his campaign challenging the propriety of that payment.

the court. That conduct is understandably well within “the letter or spirit” of the Chief Judge Rule. *Id.* What Judge Somers did, however, stands as a direct violation of the Michigan Constitution. Under *Crawford County*, Judge Somers was required to either obtain the funding unit’s approval of his self-indemnification policy, or file a lawsuit demonstrating that the Court could not function without it. He did neither.

Finally, Plaintiff suggests that Judge Somers had the power to make indemnification decisions because SCAO has published a risk management policy stating that indemnification is an “important consideration” when court employees are sued. SCAO Risk Management Policy, at p. 1 (attached as Exhibit Y to Appellant’s Appx., at p. 458a). The Court agrees that indemnification can be a key component of risk management and is appropriate in certain cases. Nothing in the SCAO policy, however, says that a chief judge has the unilateral ability to make such a decision. Quite the contrary, it acknowledges that indemnification occurs through “official action of local funding units.” *Id.* at p. 2 (Appellant’s Exh. Y, at p. 459a). The Court’s funding unit took no such official action here. Instead, Judge Somers deliberately went around the funding unit by adopting his own indemnification policy. He lacked the power to take that action under both the GTLA and the Chief Judge Rule.

B. Even If a Chief Judge Could Adopt an Indemnification Policy, He or She May Not Indemnify Employees for Liability Incurred in Their Personal Capacities.

The writ of garnishment propounded by Ms. Pucci also fails because, even if a chief judge did have the authority to indemnify court employees in some limited circumstances, that power does not extend to any liability incurred by an employee in his/her personal capacity. The law is crystal clear that a suit against a public official in his official capacity is merely “another way of pleading an action against an entity of which an officer is an agent.” *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978); accord *Hafer v. Melo*, 502 U.S. 21,

25 (1991) (holding that “the real party in interest in an official-capacity suit is the governmental entity and not the named official”). Such an action imposes liability on the entity that the official represents, as opposed to the individual personally. *See Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). In stark contrast to an official capacity suit, a claim against a defendant in his or her personal capacity “seek[s] to impose personal liability on a government official for actions he takes under color of state law.” *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Thus, “a victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him.” *Id.* at 167-168.

This distinction between official and individual capacity lawsuits is of paramount importance when it comes to the collection of any judgment that may enter. The United States Supreme Court has long recognized that “an award of damages against an official in his personal capacity can be executed only against the official’s personal assets.” *Id.* at 166; *accord Gamble v. Florida Dep’t. of Health & Rehab. Servs.*, 779 F.2d 1509, 1512-13 (11th Cir. 1986) (holding that the difference between official and individual capacity suits “is not mere semantics; the question is whether the plaintiff is reasonably seeking relief from the state coffers or from the individual’s assets”). Simply put, an individual capacity judgment may not be collected from the governmental entity that the official serves.

Judge Somers’ effort to indemnify himself for an individual capacity judgment brings the concerns underlying the separation of powers doctrine into stark focus. If Judge Somers had gone to trial in his official capacity as the Chief Judge of the Court, there would be no need for the Court to indemnify him for any judgment entered because the Court would have already been required to satisfy it. It is only because the judgment was entered against Judge Somers in his individual capacity – meaning that it could not otherwise be passed onto the Court – that he had

to adopt the indemnification policy purporting to require the Court to fund it. But if that type of judicial funding is permissible without the checks and balances of a legislative body or higher court to approve it, there would be no limit to the extent of appropriations that could be accomplished by the fiat of a single judicial officer. If a judge can procure funding to insulate himself from personal liability for a \$1.1 million judgment via the adoption of an “indemnification policy,” there is nothing to stop him from unilaterally requiring the Court to fund other personal expenses that he might otherwise wish to avoid. For example, a judge might adopt a “transportation policy” requiring the Court to pay his monthly car payment to facilitate his commute to work. Or a judge might adopt an “education policy” requiring the Court to pay off the student loans that he incurred to obtain the law degree on which his job depends.

This potential for exploitation is not merely theoretical. It is demonstrated by the very facts of this case. The indemnification policy that Ms. Pucci seeks to enforce did not exist on January 1, 2007, when Judge Somers terminated her from her position as deputy court administrator. Nor did it exist when she later filed her complaint alleging that the termination decision violated her constitutional rights. Instead, he purported to adopt the policy 4 ½ years later, just nine days before the case against him went to trial. That timing – which Judge Lawson said “ought to raise eyebrows” – says everything this Court needs to know about his motives in adopting it. Order Quashing Garnishment, at p. 4 (Appellee’s Exh. A, at p. 5b). Judge Somers was not acting in his role as chief judge looking out for the best interests of the Court. He was simply pursuing his own financial interests by engaging in a post-hoc effort to insulate himself from liability for prior misconduct in which he had engaged. That is precisely why a chief judge does not have the unilateral power to appropriate taxpayer funding. Such a circumstance is ripe for abuse and would allow “the branch of government least suited to make policy-driven

appropriations” to compel payment of a personal expense from the public fisc. *Crawford County*, 476 Mich. at 155. The chief judges of the district courts may not constitutionally indemnify themselves from liabilities incurred in their personal capacities.

Ms. Pucci offers only two arguments in support of her position to the contrary. First, she contends that Judge Somers would not have been subject to liability under 42 U.S.C. § 1983 but for the fact that he “use[d] his state-conferred office” to terminate her. Appellant’s Br., at 16-17. Ms. Pucci argues that since he violated her constitutional rights only through the abuse of his position as chief judge, it is appropriate to empower him to pass his personal liability for that misconduct onto the Court. This argument fundamentally misapprehends the nature of an action under § 1983. *Id.*

The Court does not deny that, but for his role as a judge of the Nineteenth District Court, Judge Somers would not have been in a position to fire Ms. Pucci and would not have exposed himself to § 1983 liability. That fact, however, does not transform his personal misconduct into an official act of the Court so as to justify his effort to indemnify himself. In order to maintain a § 1983 claim, a plaintiff need only show that a state official took action “under color” of law. 42 U.S.C. § 1983. Ms. Pucci apparently interprets this to mean that a government official must actually be exercising the authority legitimately conferred upon him by virtue of his office. But the federal courts have repeatedly held just the opposite: governmental officials are liable under § 1983 for actions taken in excess of their authority. *See, e.g., Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir. 1975) (“[A]cts of [government officials] who undertake to perform their official duties are included [under § 1983] whether they hew to the line of their authority or overstep it.”); *Reilly v. Hamblen County*, 2008 WL 4138117, at *3 (E.D. Tenn. Sept. 4, 2008) (“State actors, however, who exceed their authority can still be acting under color of law because the

term applies more broadly than the mere authority to act.”); *Doe v. Bone*, 2012 WL 3544754, at *9 (S.D. Ohio Aug. 16, 2012) (“A state official acts under color of law when he acts either within or outside of the bounds of the authority given to him by the State.”). If, as argued below, Judge Somers operated outside the boundaries of his authority in firing Ms. Pucci, it makes little sense to allow him to then use his state-conferred office as an excuse to dump that liability onto the governmental entity whose boundaries he violated.

Ms. Pucci’s argument also misses the mark because there is protection from § 1983 claims for those who act responsibly. If a government official exercises his or her state-conferred authority in good faith and in reasonable reliance on the law, then he or she has nothing to fear when it comes to personal liability because he or she is entitled to immunity for any individual capacity claim. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). The jury, however, found just the opposite here. It determined that Judge Somers abused his power and terminated Ms. Pucci to advance his own personal interests. In such circumstances, personal liability is entirely appropriate.

Second, Ms. Pucci warns that if this Court were to rule that Judge Somers did not have the unilateral power to indemnify himself for an individual capacity judgment, then “governmental agencies could no longer elect to indemnify police officers, firefighters, teachers, judges, judicial staff and other public employees who incur personal liability for gross negligence, employment discrimination, medical malpractice, violation of a citizen’s constitutional rights or any other claim.” Appellant’s Br., at 17-18. She predicts that this will chill public service and paralyze governmental decision-making by leaving public employees “bare and fully exposed.” *Id.*

Ms. Pucci's parade of horrors will never come to pass. Denying Judge Somers the unilateral power to indemnify himself does not undermine the GTLA in any way or prevent a single governmental agency from choosing to indemnify a single public employee. It simply ensures, in the specific context of district court administration, that there is a proper system of checks and balances in place to prevent a chief judge from single-handedly foisting a private liability on the taxpayers for his own personal misconduct. A judge must either obtain the approval of his or her funding unit for such indemnification, or demonstrate that it is essential to the operation of the court he or she serves. In other words, by upholding the ruling of the Court of Appeals, this Court will help ensure that the discretionary indemnification decisions allowed for under the GTLA are made responsibly and in furtherance of the public interest.

C. The Conduct Giving Rise to the Judgment Against Judge Somers Did Not Occur in the Course of His Employment or Within the Scope of His Authority.

Finally, Ms. Pucci's effort to enforce the indemnification policy against the Court fails because the GTLA authorizes indemnification only for actions taken by an employee "while in the course of employment and while acting within the scope of his or her authority." MCL 691.1408(1). Judge Somers' termination of Ms. Pucci does not satisfy either prong of that statutory condition. His conduct in firing her was both beyond the scope of his authority and outside the course of his employment.

Ms. Pucci admits, as she must, that Judge Somers' authority was limited to "the reasonable power that [he had] been delegated or might foreseeably be delegated in carrying out the [Court's] business." Appellant's Br., at 21. The power delegated to Judge Somers with respect to personnel decisions is set forth plainly in the Chief Judge Rule. It permitted him to "supervise the performance of all personnel, with authority to hire, discipline, or discharge such personnel." MCR 8.110(C)(3)(d). Again, however, that power was not unlimited. His

authority to make termination decisions was expressly circumscribed by his broader obligation under the Chief Judge Rule to “effect compliance by the court with all . . . provisions of the law.” MCR 8.100(C)(3)(h). Thus, under the plain language of the rule, Judge Somers did not have the authority to terminate an employee for a reason that defied the law, such as the employee’s exercise of her First Amendment rights, which is exactly what the jury found here. By firing Ms. Pucci for being critical of his practice of espousing his religious views from the bench, he acted well beyond the scope of his authority to make personnel decisions.

But it is not only the text of the Chief Judge Rule that confined Judge Somers’ powers. The courts in this state have also acknowledged, as a matter of law, that it is not within the scope of authority of a governmental actor to commit acts of intentional misconduct. In *Slanga v. City of Detroit*, 152 Mich. App. 220 (1986), for example, a plaintiff who was arrested by a police officer without cause brought false arrest and intentional infliction of emotional distress claims against the municipality that employed him, claiming that it was vicariously liable for the officer’s conduct because the power to arrest fell within the scope of his authority. The court rejected that view and found that the city could not be held accountable for the officer’s actions because “intentional” acts of misconduct “were ultra vires and therefore, by definition, were outside the scope of the officer’s authority.” *Id.* It explained: “While an officer is authorized to preserve the public peace and arrest offenders, his authority does not extend to gratuitously prosecuting innocent persons.” *Id.*; accord *Lowery v. Dep’t of Corrections*, 146 Mich. App. 342, 357 (1985) (“[A]n employee cannot be viewed as acting within the scope of his authority while committing an intentional tort.”).

The same basic principle governs Judge Somers’ conduct in this case. A chief judge is authorized to make personnel decisions. However, he does not have the ability to gratuitously

terminate a “highly regarded and respected” employee because he personally disagrees with a private romantic relationship in which she is engaged. Appellant’s Br., at 2 n.2.

Judge Somers’ termination decision also fell outside the course of his employment. This Court has long held that an employee does not act within the course of his employment if he “steps aside from his employment to gratify some personal animosity or to accomplish some purpose of his own.” *Martin v. Jones*, 302 Mich. 355, 358 (1942); accord *Burch v. A & G Assocs., Inc.*, 122 Mich. App. 798, 804 (1983). Ms. Pucci acknowledges this standard in her own brief, explaining that one of the “necessary considerations” to establish course of employment is “the notion that the act in question was undertaken in further of the employer’s purpose.” Appellant’s Br., at 19 (quoting *Neiderhouse v. Palmerton*, 300 Mich. App. 625, 633 (2013)).

This standard is dispositive of the course of employment issue presented by this appeal because the record is clear that Judge Somers did not intend to advance any purpose of the Court in firing Ms. Pucci. As recognized by the Sixth Circuit Court of Appeals, while he “leaned heavily on the notion that reorganization [of the Court] was his motive for terminating Pucci” throughout the trial of the underlying case, the jury explicitly “rejected” that defense. *Pucci v. Nineteenth District Court*, 596 Fed. Appx. 460, 475 (6th Cir. 2015). It found instead, just as Ms. Pucci alleged in her complaint, that the purported reorganization was a “pretext” and “subterfuge,” and that Judge Somers terminated her because he was acting out of “animus” and to advance his own “personal interests.” Third Amended Compl., at ¶¶ 45, 51, 79 (Appellant’s Exh. N, at pp. 123a-124a, 130a-131a).

Ms. Pucci’s argument to the contrary misstates both the facts and the law. She contends, for example, that Judge Somers was acting within the course of his employment because it is

“undisputed” that he fired her pursuant to a “reorganization” that was designed to advance “the best interest of the court.” Appellant’s Br., at 20. Not only is that statement inconsistent with her entire theory of the case, but it is plainly contradicted by the final remarks that she made to the jury in order to win the individual capacity judgment that she now seeks to enforce. During closing argument, Ms. Pucci pointedly told the jury:

Everything here is personal. There certainly was an agenda. It’s impossible to deny the fact that this was personal. But Judge Somers would have you believe this was a nice, clean, ordinary reorganization. That’s all. Just a business decision. That doesn’t make any sense and the evidence doesn’t support that.

Trial Tr., at p. 960 (Appellee’s Exh. B, at p. 22b). Having taken that position, she cannot now argue that Judge Somers was acting in pursuit of the official business of the Court.

Ms. Pucci also argues that, even if he fired her for personal reasons, Judge Somers acted within the scope of his authority and course of employment because the law prohibits any consideration of his motive for terminating her. In order to advance that argument, however, she cites to decisions interpreting statutes having no application here. In *Whitman v. City of Burton*, 493 Mich. 303, 313 (2013), for example, this Court held that the Whistleblower Protection Act does not require a plaintiff to prove that he was motivated by a desire to inform the public of a matter of public concern in order to make out a whistleblower claim. And in *Petipren v. Jaskowski*, 494 Mich. 190, 207 (2013) and *American Transmissions v. Attorney General*, 454 Mich. 135, 143 (1997), this Court held that an executive official is entitled to claim executive immunity even if he acts with personal animus. Not only does this case have nothing to do with whistleblowing or executive immunity, but the whistleblowing and immunity statutes don’t even contain language addressing the operative scope of authority or course of employment principles that govern the application of MCL 691.1408(1).

The bottom line is that a government official who intentionally violates an employee's constitutional rights for personal reasons unrelated to the business of the entity that he is supposed to be serving is not acting within the course and scope of his job. Nothing in MCL 691.1408(1) authorizes Judge Somers' effort to indemnify himself for a liability predicated on an action taken to advance his own private interests and in defiance of the very oath that he swore to secure his office. The individual capacity judgment that Ms. Pucci obtained in the underlying case may be collected from Judge Somers and Judge Somers alone.

CONCLUSION

There is no lawful basis to require the Nineteenth District Court to pay the judgment entered against Judge Somers in his individual capacity. He had no authority to adopt the indemnification policy giving rise to Ms. Pucci's writ of garnishment, and thus that policy is wholly unenforceable. The Court of Appeals properly dismissed Plaintiff's garnishment claim. Accordingly, Garnishee Defendant-Appellee Nineteenth District Court respectfully requests that this Court affirm that decision.

Respectfully submitted,

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Nineteenth District Court

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